Filed 6/30/09 In re D.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	E046890 (Super.Ct.No. RIJ117001) OPINION

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed with directions.

Patrick J. Hennessey, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant D.S., a minor, was charged with commission of lewd and lascivious acts upon a child under the age of 14 by use of force, violence, duress or menace (count 1; Pen. Code, § 288, subd. (b)(1)[1]); assault with intent to commit rape (count 2; § 220, subd. (a)); and sexual battery by restraint (count 3; § 243.4, subd. (a)).

The juvenile court found true as to count 1 that Darren (minor) committed the lesser included offense of assault with commission of lewd and lascivious acts upon a child under the age of 14, *without* use of force, violence, duress or menace (count 1; § 288, subd. (a)). The court also found true that minor committed counts 2 and 3, as charged. The court declared minor a ward of the court and ordered him placed in suitable out-of-home placement. He was placed on probation, subject to specified terms and conditions, with a maximum period of confinement of 10 years four months.

On appeal, minor contends there was insufficient evidence supporting the court's true findings on counts 2 and 3. Minor also asserts that his true finding on count 2 (assault with intent to commit rape) must be set aside since it is a lesser included offense of count 1. Minor further argues that under section 654 the court erred in imposing separate consecutive terms on counts 2 and 3.

We reject minor's contentions, with the exception that the term of confinement for count 3 must be stayed under section 654. We affirm the remainder of the juvenile court's dispositional order.

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

1. Facts

During the afternoon of July 25, 2008, Brenda, who was 13 years old at the time, was at minor's house visiting friends, including minor's 14-year-old sister, Shelby. They were all drinking beer. Minor's parents were not home. When Brenda went to wash her hands in the bathroom, minor, who was 15 years old, entered the bathroom. According to Brenda, minor grabbed her arms, held her up against the bathroom wall, and fondled her breasts and buttocks. She tried to turn away and told him, "No." Minor told Brenda he wanted to have sex with her.

Minor tripped Brenda, causing her to end up on her back on the bathroom floor. Minor sat on her chest, straddling her. He kissed her chest area and mouth, and fondled her breasts and buttocks. Minor again told Brenda he wanted to have sex with her. Brenda told minor several times she did not want to have sex. While sitting on Brenda, minor pinned her arms down so she could not move, pulled his penis out of his pants and put it on her chest. According to Brenda, minor insisted she look at his penis and asked her to put it in her mouth. Brenda tried to get away but minor grabbed her and put her back on the ground.

Brenda's trial testimony was consistent with her statement made to Police Officer Sauer. Officer Sauer also interviewed minor. He admitted he entered the bathroom when his sister was not looking and asked Brenda if she wanted to have sex with him. He grabbed Brenda and tried to kiss her. Brenda turned away and said, no. Minor also admitted fondling Brenda's breasts and grabbing her buttocks. He put his hand down her pants and Brenda turned and pulled it away. Minor also admitted pulling his penis out of

his pants and attempting to have sex with Brenda. He never told Officer Sauer that Brenda consented to any of these sexual acts.

Minor's sister, Shelby, testified that after minor took a shower, she saw Brenda in the bedroom with a strange smile on her face. When Shelby asked her if anything had happened between Brenda and minor, Brenda said "no," smiled, and said it was between minor and Brenda. A little later, Brenda told Shelby minor had wanted to have sex with her.

Minor's friend, Luis, testified he was at minor's house during the incident. He saw Brenda laughing when she came out of the bathroom 30 seconds after minor came out.

Minor testified he had consumed a 40-oz. bottle of King Cobra malt liquor while he was playing a computer game. He then took a shower and got dressed. Minor noticed Brenda had gone into the bathroom. He walked in and asked her if she wanted to have sex. Minor partially closed the bathroom door, leaving it cracked open. Brenda told minor she did not want to have sex with him. Minor was holding her by her buttocks. They started kissing each other. Brenda sat on the floor. Minor laid her down on the floor and lay next to her.

Minor denied getting on top of her. He claimed the two started French kissing. Minor pulled out his penis and asked Brenda again if she wanted to have sex and Brenda said, no. Minor put his penis back in his pants, left the bathroom, and went back to his bedroom. Minor admitted that at the time of the incident, he was attracted to Brenda and

thought he would try his "luck and see if she would go for it." Minor had never had any type of relationship with Brenda.

According to minor, Lozano, one of minor's best friends and Shelby's boyfriend at the time of trial, was not at minor's home that day.

2. Sufficiency of Evidence as to Counts 2 and 3

Minor contends there is insufficient evidence to sustain the juvenile court's true findings as to counts 2 and 3. We disagree.

A. Sufficiency of Evidence Standard of Review

"'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials. [Citation.]'" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088, quoting *In re Jose R.* (1982) 137 Cal.App.3d 269, 275; see also *In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404.) Our review of any claim of insufficiency of the evidence is limited. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) If the evidence presented below is subject to differing inferences, the reviewing court must assume that the trier of fact resolved all conflicting inferences in favor of the prosecution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 326.) A reviewing court is precluded from making its own subjective determination of guilt. (*Id.* at p. 319, fn. 13.)

Given this court's limited role on appeal, minor bears an enormous burden in arguing there was insufficient evidence to sustain the true findings on counts 2 and 3. If the findings are supported by substantial evidence, we are bound to give due deference to the juvenile court's findings and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the juvenile court to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) Minor's hurdle to secure a reversal is just as high when the prosecution's case depends on circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Here, the record discloses ample evidence supporting the juvenile court's true findings as to counts 2 and 3.

B. Count 2

Minor challenges the sufficiency of evidence as to count 2, assault with intent to commit rape (§ 220, subd. (a)).[2] Specifically, minor argues there was insufficient evidence establishing that when he assaulted Brenda, he intended to rape her. Minor claims the evidence only established that his advances were based on his mistaken belief that he might get "lucky." Minor notes the juvenile court rejected the allegation as to count 1, that he used force to commit a lewd and lascivious act upon Brenda.

Under section 220(a), a conviction for assault with intent to commit rape requires proof that "an assault was committed, and that at some time during the assault it was the

[2] We refer to section 220, subdivision (a) in this opinion as section 220(a).

intention of the defendant to have sexual intercourse with his victim by force." (*People v. Clifton* (1967) 248 Cal.App.2d 126, 129.) Our high court in *People v. Maury* (2003) 30 Cal.4th 342, 399-400, noted that "'"The essential element of [assault with intent to commit rape] is the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required."' [Citation.] '"[I]f there is evidence of the former intent and acts attendant to the execution of that intent, the abandonment of that intent before consummation of the act will not erase the felonious nature of the assault."' [Citation.]"

Here, there was ample evidence of conduct consistent with an intent to rape. Such evidence included testimony that minor entered the bathroom and closed the door most of the way; grabbed Brenda from behind; pushed her up against the wall; and fondled Brenda's breasts and buttocks despite Brenda telling him to stop. Minor repeatedly told Brenda he wanted to "fuck" her, even after she made it clear she did not want to have sex with him. He continued his forceful sexual advances, grabbing Brenda when she tried to leave; tripping her, causing her to fall to the ground; sitting on her and straddling her after she fell down and was on her back; and pulling his penis out of his pants and telling her to look at it while he was sitting on top of her. In addition, there was evidence minor did not have any type of relationship with Brenda. Brenda was merely a friend of minor's sister.

Minor also admitted many facts indicating an intent to rape Brenda. He admitted he had entered the bathroom after noticing Brenda was in there; Brenda told him she did

not want to have sex with him when he asked; minor fondled her buttocks; minor laid Brenda down on the floor and lay next to her; and minor pulled out his penis and asked Brenda again if she wanted to have sex, and Brenda said, no. Minor admitted that at the time of the incident, he was attracted to Brenda and decided to try and have sex with her.

Even though minor eventually abandoned his intent to rape before consummation of the act, this did not negate the felonious nature of the assault. (*People v. Maury, supra,* 30 Cal.4th at p. 400.) The record discloses ample evidence to support the juvenile court's true finding that minor assaulted Brenda with intent to rape her.

C. Count 3

Minor contends there was insufficient evidence supporting his true finding for sexual battery by restraint (§ 243.4, subd. (a)[3]). Minor argues there was no evidence of unlawful restraint. Minor asserts this is apparent from the juvenile court's finding as to count 1 that minor did not use force in committing count 1 lewd and lascivious acts (§ 288, subd. (b)(1)).

Regardless of the juvenile court's findings as to count 1, we conclude there was ample evidence supporting a finding that minor used unlawful restraint and force when committing sexual battery upon Brenda. Section 243.4(a) provides that "Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched

[3] We refer to section 243.4, subdivision (a) in this opinion as section 243.4(a).

and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery." (§ 243.4(a).)

A person is unlawfully restrained under section 243.4(a) "when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will; a restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. The 'unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.' [Citation.]" (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28 (*Arnold*).)

Minor cites *Arnold, supra,* 6 Cal.App.4th 18, for the proposition there was insufficient evidence of unlawful restraint. In *Arnold*, the defendant was a school teacher who went jogging with a 17-year-old female high school student who was infatuated with the teacher. (*Id.* at p. 22.) The defendant's sexual advances initially consisted of pulling the student toward him, grabbing her buttocks, and fondling her breasts. The student willingly accompanied the defendant and did not object to these initial acts. (*Id.* at pp. 22, 29.) As to these initial acts, the court in *Arnold* concluded such conduct did not constitute unlawful restraint under section 243.4. (*Id.* at p. 30.)

Arnold is distinguishable. In the instant case Brenda protested and resisted minor's sexual advances. In addition, there is evidence minor grabbed her and pinned her up against the bathroom wall while fondling her. He caused her to fall to the ground by tripping her and then sat on her and straddled her, while pinning her arms down and

putting his penis on her chest. At one point, when she tried to leave, he pulled her back to the ground and continued his sexual conduct. Throughout the ordeal, Brenda repeatedly protested and resisted minor's sexual advances. Minor nevertheless persisted until eventually he let Brenda go, but not until after subjecting her to numerous unwanted sexual acts which were inflicted upon her by means of physical force.

Here, the unlawful restraint was "'something more than the exertion of physical effort required to commit the prohibited sexual act.'" (*Arnold, supra,* 6 Cal.App.4th at p. 28, quoting *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661.) Minor prevented Brenda from leaving by physically restraining her. The evidence was thus more than sufficient to support the court's finding that minor committed sexual battery by restraint in violation of section 243.4(a).

3. Count 2 as a Lesser Included Offense of Count 1

Minor argues that count 2 (assault with intent to commit rape or other specified sexual act; § 220(a)) is a lesser included offense of count 1 (commission of lewd and lascivious acts by force; § 288, subd. (a)[4]).

The accusatory pleading (petition) alleges in count 1 that minor violated section 288, subdivision (b)(1) by unlawfully committing a lewd and lascivious act upon Brenda by use of force, with the intent of arousing and gratifying his sexual desires. The petition alleges in count 2 that minor unlawfully assaulted Brenda with intent to commit rape in violation of section 220(a).

[4] We refer to section 288, subdivision (a) in this opinion as section 288(a).

During closing argument, the prosecutor argued that minor committed count 1 by touching Brenda's breast area, buttocks, and other parts of her body; telling her he wanted to have sex with her; using force to commit the offense; and acting with intent to arouse or satisfy his sexual desires.

The prosecutor noted that the only disputed element of count 1 was that the offense was committed with force. The juvenile court ultimately reduced the charge to a violation of section 288(a), based on a finding of lack of force.

With regard to count 2, the prosecutor stated during closing argument that "Count 2 is assault with the intent to commit a sexual offense. In this case a sexual offense is a 288, lewd act upon a child under 14. That has been established. You know that [D.S.] not only assaulted her, he did touch her in a harmful and offensive manner. The slightest touching is sufficient and he did it with the intent of trying to have sex with her." The prosecutor further stated as to count 2 that it was established that minor assaulted Brenda and touched her in a harmful and offensive manner, with the intent of trying to have sex with her.

Minor argues count 2 was a lesser included offense of count 1 because the prosecutor argued count 2 was based on the offense alleged in count 1. But the prosecutor also argued, as alleged in the petition, that count 2 was founded on acts consistent with a finding minor assaulted Brenda with intent to rape her.

As explained by our high court in *People v. Reed* (2006) 38 Cal.4th 1224 (*Reed*), the court has "applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory

pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]" (*Id.* at pp. 1227-1228.)

The court in *Reed* differentiates between application of the two tests. The *Reed* court explained: "[W]e believe it is logically consistent to apply the accusatory pleading test when it is logical to do so (to ensure adequate notice) but not when it is illogical to do so (when doing so merely defeats the legislative policy permitting multiple conviction). Our conclusion results in a straightforward overall rule: Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Reed, supra,* 38 Cal.4th at p. 1231.)

Here, the issue is whether minor may be convicted of multiple charged crimes. We therefore apply the statutory elements test and consider whether the statutory elements of the greater offense (count 1) include all the elements of the lesser offense (count 2), such that the greater cannot be committed without also committing the lesser. (*Reed, supra,* 38 Cal.4th at p. 1231.)

Count 1 alleged minor violated section 288(a). "[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual

desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.)

Minor's count 2 true finding was for violating section 220(a). Section 220(a) is violated upon committing an assault upon another with the intent to commit mayhem, rape, sodomy, oral copulation, or a violation of sections 264.1 (rape with a foreign object), 288 (lewd or lascivious acts), or 289 (forcible acts of sexual penetration). (§ 220.)

Minor's reliance on *People v. Elam* (2001) 91 Cal.App.4th 298 for the proposition the section 220(a) offense is a lesser included offense of a section 288(a) offense, is misplaced. The court in *Elam* held simple assault is a lesser included offense of assault with intent to commit forcible oral copulation under section 220. (*Elam, supra,* at p. 308.) The court explained: "'An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery[, defined as] "any willful and unlawful use of force or violence upon the person of another."' [Citations.] It requires 'the general intent to willfully commit a battery, an act which has the direct, natural and probable consequences, if successfully completed, of causing injury to another.' [Citation.] Inasmuch as assault with intent to commit forcible oral copulation is merely a simple assault committed with the specific intent to force the victim to commit oral copulation [citation], simple assault is a lesser offense necessarily included in the greater offense." (*Ibid.*)

The issue here is not whether simple assault (§ 240) is a lesser included offense of a section 220(a) offense. Rather, the issue is whether a violation of section 220(a), assault with intent to commit rape or some other specified sexual offense, is a lesser included offense of a section 288(a) offense (committing lewd acts upon a child under 14).

Because section 288 does not require the same intent element required in a section 220(a), the section 220(a) offense is not a lesser included offense of a section 288(a) offense. (*Reed, supra,* 38 Cal.4th at p. 1231.) A section 288(a) offense can be committed without establishing assault with intent to commit mayhem, rape, sodomy, oral copulation, or a violation of sections 264.1 (rape with a foreign object) or 289 (forcible acts of sexual penetration). (§ 220.) (*Reed, supra,* 38 Cal.4th at p. 1231.)

While intent to commit a section 288 offense can form the basis of a section 220(a) offense, a section 220(a) offense can be committed without such intent. For instance, the offense can be committed by establishing intent to commit other sexual offenses, such as rape, as alleged in the petition in this case.

Regardless of the prosecutor stating that the section 288 offense supported the section 220 true finding, the prosecutor also argued conduct supporting a finding of intent to rape supported the section 220(a) finding. And regardless of the prosecutor's closing argument, under the statutory elements test, we conclude that the count 2 true finding for violating section 220(a) is not a lesser included offense of count 1 (§ 288(a)).

4. Consecutive Sentencing in Violation of Section 654

The court imposed the upper eight-year term on count 1 (§ 288(a)) and consecutive periods of confinement for counts 2 and 3, for a total term of 10 years four months. Minor contends the juvenile court committed sentencing error under section 654 by imposing consecutive terms on counts 2 and 3, rather than staying the terms.

Section 654, subdivision (a) provides in pertinent part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." This provision also precludes imposition of multiple punishments for criminal acts committed as the means of accomplishing a single objective. Thus, if a crime is committed solely to facilitate the commission of another offense, section 654 permits punishment only for one offense. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*); *People v. Perez* (1979) 23 Cal.3d 545, 553-554 (*Perez*).)

In the case of multiple sexual crimes committed during a single encounter, each offense is normally deemed to have a separate objective and is not part of an indivisible transaction within the meaning of section 654. (*Harrison, supra,* 48 Cal.3d at p. 335; *Perez, supra,* 23 Cal.3d at pp. 552-554.) Although the defendant's intent or objective is primarily a factual issue, the application of section 654 to undisputed facts is a question of law, which we determine de novo. (*Harrison, supra,* 48 Cal.3d at p. 335; *Perez, supra,* 23 Cal.3d at p. 552, fn. 5.)

Here, although the three charged offenses occurred during a single encounter, the juvenile court viewed them as separate acts. The prosecutor argued during closing argument that count 1, commission of lewd and lascivious acts, consisted of the various sexual acts in which minor fondled Brenda and put his hand down her pants. The court stated it found as to count 1 that minor committed a lewd act but concluded minor did not use force beyond that necessary to perform the lewd acts. The court therefore reduced the offense to a section 288(a) violation which does not require a finding of force.

As to count 2, assault with intent to commit a sexual offense (§ 220(a)), the petition alleged minor committed an assault with intent to commit rape. The prosecutor argued during closing argument that the offense was premised on minor's intent to commit a section 288 sexual offense, that is, the same lewd acts alleged in count 1. The prosecutor added, however, that the acts were committed with the intent of trying to have sex with Brenda. The court stated it found as to count 2 that the evidence established minor touched or assaulted Brenda with the intent to commit a sexual offense, consisting of raping Brenda. The court explained this intent was established when minor told Brenda he wanted to have sex with her and the assault was not invited by Brenda.

With regard to count 3, sexual battery by restraint (§ 243.4(a)), the prosecutor argued Brenda testified minor held her down, straddled her, and held her by the arms. Brenda testified she could not get away while restrained. Then, against Brenda's will,

minor touched Brenda's breast and buttocks, and tried to touch her "vagina."[5] The court stated it found as to count 3 that, while minor restrained Brenda, he touched Brenda's breasts and buttocks, and put his hand down her pants in an attempt to touch her "vagina."

Here, the issue is whether minor's course of conduct consisted of indivisible acts involving a single objective or whether such conduct can be construed as consisting of separate, distinct acts subject to multiple punishment for each charged offense. All of the acts alleged in counts 1, 2, and 3 occurred during a relatively short period of time, in the same location.

Upon reviewing the evidence de novo, we conclude that in applying section 654, there is no distinction between the acts comprising counts 2 and 3. The same conduct constituting assault with intent to commit rape forms the basis of the charge of sexual battery by restraint. The assault, intent to rape, restraint of Brenda, and minor's comments that he wanted to have sex with Brenda were all part of the same indivisible course of conduct and objective. There does not appear to be any basis for parsing out the assault with intent to rape (count 2) from the sexual battery (count 3). Thus, under section 654, the term of confinement for count 3, the offense carrying the shorter term, must be stayed.

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[5] The witness used the word "vagina" but she probably meant "genitals" because she describes external touching, not any kind of internal penetration. Although the word "vagina" is used in the testimony, the vagina is an internal organ, defined as "[t]he passage leading from the opening of the vulva to the cervix of the uterus in female mammals." (American Heritage Dict. (4th ed. 2000).)

Separate and consecutive terms of confinement are proper as to count 1, the principal term, and count 2, since minor's initial acts of fondling Brenda while she was standing in the bathroom can be reasonably viewed as distinct acts, separate from minor's acts of subsequently tripping Brenda, causing her to fall on the floor, and then restraining her while fondling her and exposing himself.

5. Disposition

The disposition order is modified in the following respect: The term of confinement for count 3 is stayed pending successful completion of the term for count 2, pursuant to section 654. As modified, the order is affirmed. The juvenile court is directed to prepare a corrected abstract of the disposition and forward a certified copy of the order to the Division of Juvenile Justice of the Department of Corrections and Rehabilitation.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.